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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 795

UREY WOODSON, AS ALIEN PROPERTY CUSTODIAN OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES,

Petitioners,

vs.

DEUTSCHE GOLD UND SILBER SCHEIDEANSTALT VORMALS ROESSLER, A CORPORATION, FRANKFURT A/MAIN, GERMANY.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RICHARD H. WILMER,
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Opinions Below.

The Supreme Court of the District of Columbia rendered no written opinion. The opinion of the Court of Appeals, District of Columbia, is reported in 68 F. (2d) 391, and may also be found in LXI Washington Law Reporter, p. 896.

Question Presented.

The only question presented is whether or not the Alien Property Custodian was authorized under the Trading with the Enemy Act, as amended, to deduct and retain from seized property of a former enemy, to cover administration expenses, an amount computed at a fixed percentage applicable alike to the property of all other similar claimants and bearing no relation to the actual and necessary cost of the work done or services performed in securing the possession, collection or control of the particular claimant's property or in protecting or administering the same.

Statement.

While the facts as stated in the petition are correctly stated so far as they go, there are certain other facts to which we desire to call the Court's attention. Also, in some instances it is believed that a slight elaboration of the facts stated may be helpful.

In originally securing the possession, collection and control of the property of the respondent and Holzverkohlungs Industrie Aktiengesellschaft, hereinafter referred to as Hiag, and in protecting and administering the same, the Custodian had actually paid out by way of fees, commissions, costs, attorneys' fees, etc., $40,251.74 in so far as the property owned by the respondent was concerned, and $13,608.12 in so far as the property owned by Hiag was concerned (R. 9), a total of $53,859.86. These expenses are detailed in Exhibits A and B, respectively, to the petitioners' answer (R. 27-29). The amount of these expenditures the respondent is not seeking to recover in this suit (R. 9). In passing, it is important to note that these actual expenses

regarded as necessary by the Custodian were charged against, and were paid out of the properties contained in the specific trusts of the two claimants in the amounts actually incurred and were not charged against the general administration costs of the Custodian's office. In principle this feature was dealt with in the manner which we contend herein was proper and should have been followed in the case of all other expenses incurred.

When property was released to the respondent and Hiag under the Winslow Act and the War Claims Act there were deducted 1% and 2% administration fees. From the property of the respondent there had been retained and withheld at the time this suit was instituted, as purporting to represent 1% and 2% administration fees, $39,599, and from the property of Hiag the amount of $20,747.52, in the aggregate $60,346.52 (R. 10). The record erroneously totals these amounts as $260,346.52 (R. 10).

In addition thereto the Custodian also deducted from Treasury interest earned after March 4, 1923, by the respondent's invested cash, the sum of $5,841.70, and from the Treasury interest earned by Hiag's invested cash $2,300.61, a total of $8,142.31 (R. 11). These amounts were deducted by the Custodian on the Treasury interest as received by him, first at the rate of 1% and later at the rate of 2% (R. 11). This seems to have represented a secret deduction which was never communicated by statement or otherwise to the respondent or Hiag by either the Treasurer of the United States or the Alien Property Custodian, and only in or about the year 1932 was discovered by counsel for the respondent (R. 11), after the original bill had been filed to recover the amounts at that time known to have been deducted and retained in connection with releases under the Winslow and War Claims Acts.

These amounts so retained and withheld were deposited by the Custodian either in his account with the Treasury Department or in a special fund then kept at the Commercial National Bank, Washington, D. C. (R. 12). From these two funds were deducted the running expenses of the Custodian's office, and also amounts to pay to American, neutral and allied nationals the amounts of administration fees which had previously been improperly charged against, and deducted from, their erroneously seized property (R. 4 and 5). As of December 31, 1930, the aggregate of the two funds amounted to $4,143,573.27 (R. 5); as of December 31, 1931, they amounted to $4,148,396.53 (Annual Report of the Alien Property Custodian for 1931); as of December 31, 1932, they amounted to $4,-124,238.23 (Annual Report of the Alien Property Custodian for 1932); and as of December 31, 1933, this fund held solely in the Treasury amounted to $4,035,-614.05 (Annual Report of the Alien Property Custodian for 1933).

It appears that in 1923 all of the seized shares of stock belonging to the respondent and Hiag were actually converted into cash (R. 27-29), so that after that period virtually the only services rendered by the offices of the Custodian and Treasurer of the United States were to deposit the cash in an account with the Treasury Department, to receive Treasury interest therefrom (R. 11), and finally to release to the claimants in cash the amounts determined to be due them after such auditing, etc., as might be necessary in that connection.

The respondent by its bill, as amended, sought recovery under the Trading with the Enemy Act, as amended, of the amounts which it claims were illegally

withheld and deducted from its property and that of Hiag—namely $69,888.83 plus interest, made up as follows:

	Respondent	Hiag	Total
Winslow Act.....	$700.00	$700.00	$1,400.00
War Claims Act.....	39,599.00	20,747.52	60,346.52
Undisclosed commissions on Treasury interest	5,841.70	2,300.00	8,142.31
Total			$69,888.83

(R. 10 and 11)

ARGUMENT.

1. The only point involved in this case has already been definitely settled by this Court.

By Section 24 of the Trading with the Enemy Act, 42 Stat. 1511, 1516, the Custodian "is authorized * * * to pay the necessary expenses incurred by him * * * in securing the possession, collection or control * * * or in protecting or administering" the enemy property. While this language is clear in authorizing the Custodian to deduct only the "necessary expenses" incurred by him in connection with the management of specific property, he assumed it to mean that he could in all cases make the same flat rate deduction as an administration expense, irrespective of the simplicity or complexity of the cases or the necessity for the deduction. This interpretation by the Custodian was declared to be erroneous by this Court in the case of *Escher* v. *Woods*, 281 U. S. 379. In that case, to which we shall hereafter refer as the *Escher* case, brought by

a Swiss citizen for the recovery of administration fees deducted and withheld, this Court speaking through Mr. Justice Holmes, at pages 383, 384 and 385, said:

> "To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, §12, 40 Stat. 411, 423, amended by Act of March 28, 1918, c. 28, 40 Stat. 459, 460 (50 U. S. C. A. Appendix §12), by which the Alien Property Custodian is 'vested with all of the powers of a common-law trustee' in respect of all property, 'other than money', received by him under the Act and may exercise any powers appurtenant thereto 'as though he were the absolute owner thereof'. They also invoke Executive Order, February 26, 1918 (No. 2813) that the Custodian 'may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property * * * and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.' Also Order of July 16, 1918 (No. 2916), of which it is necessary to mention only the direction that the expenses 'shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which' the expenses shall have arisen provided that if the property or assets of the business are insufficient, they may be satisfied out of other property 'received from, or as the property of, the same enemy.' Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding §24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other prop-

erty of the same person, 42 Stat. 1511, 1516 (50 U. S. C. A. Appendix, §24); and May 16, 1928, c. 580, 45 Stat. 573, 574, that 'all expenses of the office * * * including compensation of the Alien Property Custodian * * * shall be paid from interest and collections on trust funds and other properties under the control of such Custodian.' It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

"*We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary, the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner.* But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm." (Italics ours.)

It is evident, as alleged in the bill, as amended, that in making the flat rate deductions for administration expenses applicable alike to all former enemy claimants irrespective of the simplicity or complexity of the administration of their property, the Alien Property

Custodian has treated former enemy property in his hands as one great trust to be called on to bear the expenses of administration as one homogeneous whole (R. 6), exactly contrary to the determination of this Court as above quoted.

The petitioners urge that, this Court having decided the *Escher* case on two grounds, the second of which was sufficient to support the decision, should now reverse the first ground of its decision.

In the instant case the Court of Appeals, after discussing the *Escher* case and quoting from the decision of this Court, concluded its opinion by stating:

> "Whatever may have been the practice of the Alien Property Custodian in making flat-rate deductions for administrative expenses applicable alike to all enemy claims, irrespective of the simplicity or complexity of the administration of their property, the action of the Custodian in treating all enemy property as a single trust, to bear the expense of administration as one homogeneous whole, is clearly contrary to the holding of the Supreme Court in the above case."

This opinion without further comment on our part would seem to sufficiently answer the point urged by the petitioners, namely, that a practice of flat-rate deductions had grown up in the Custodian's office; and that Congress had by subsequent amendments of the Trading with the Enemy Act ratified such practice so as to make such practice determinative of the meaning of the language of Section 24. Such practice might be an element to be considered in determining the meaning of an ambiguous statute, but this Court has already determined the meaning of the statute free from any ambiguity. Therefore, it seems to us that any reference to the practice is entirely beside the point.

It will be noted that in paragraph 2 of the petitioners' argument this Court is asked to completely disregard and, in effect, reverse the first ground of its decision in the *Escher* case. The Court had before it in that case all of the Executive Orders and all the provisions of the Trading with the Enemy Act, as amended, now urged. Also the Custodian's practice, which we feel is quite beside the point, was allegedly brought to Congress' attention during the years 1926 and following. The *Escher* case was decided in 1930. However, unless this Court expressly reverses the first ground of its decision in the *Escher* case above quoted, the question here presented must be considered as finally and definitely settled by that decision.

In Footnote 2 on page 9 of the petition reference is made to the Treaty of Peace between the United States and Germany proclaimed November 14, 1921 (42 Stat. Pt. 2-1939). Despite the fact that the Trading with the Enemy Act had been five times amended [1] since the ratification of the Treaty and the right to sue had been preserved thereby, it was urged in the courts below that the provisions of the Treaty forbade former alien enemies from prosecuting suits of this type, which are suits for the recovery of unreturned property. Although this point was vigorously presented to both courts below, decisions were rendered in each instance favorable to the respondent.

2. Importance of case.

As an inducement for the granting of the writ herein the petitioners urge, first, the possibility that unless

[1] NOTE: The amendments to the Trading with the Enemy Act above referred to are as follows: December 21, 1921, 42 Stat. 351; December 27, 1922, 42 Stat. 1065; March 4, 1923, 42 Stat. 1511; May 7, 1926, 44 Stat. 406; and March 10, 1928, 45 Stat. 254.

this case is heard and reversed the respondent and others similarly situated will "presumably" be entitled to recover the full amounts claimed. This respondent is claiming the right to a return of all administration deductions, as it has no knowledge of what was the "necessary" expense or the means of ascertaining the same. While the Custodian kept no exact records of time spent on specific claims, it is unthinkable that in final analysis from records available in his office he would not be able to reconstruct, at least in great measure, the approximate costs of administering the large trusts. These are the only ones, for practical reasons, which are likely to be the subject of claim or litigation. From a practical standpoint, it is clear that in the large volume of small claims the flat-rate deductions would equal or, possibly, be less than the actual necessary expenses incurred in seizing and administering the particular property.

Secondly, the petitioners urge that unless this case is heard and reversed, Congress will have to appropriate large sums to satisfy claims and pay future expenses of the Custodian's office. The Custodian as of December 31, 1933, still retained in his administration fund $4,035,614.05, according to his Annual Report for the year 1933, page 3. This, indeed, is a very comfortable amount from which to reimburse the larger claimants, who might sue or who might press their claims, for the amounts of excessive deductions and, also, to keep the Custodian's office running for a long period of time. This report shows, at page 5, that it would cost, at the outside, $275,000 a year to continue that office on its present scale in order to administer property still subject to active administration of the value of less than $12,000,000 ($67,181,234.75 less $55,458,918.56 now held

pending its "covering in" at the Treasury Department and requiring no further administration, pages 2 and 3 of said report), for which he is now employing some seventy-five persons, according to page 7 of the report. Even this amount of about $12,000,000 includes unclaimed property of substantial value (see page 4 of the report) which would not seem to require any active administration.

The Custodian's own report, therefore, would indicate that the probability of a long continuance of his office with "the appropriation by Congress of large sums of money", if this case is not heard and reversed, can not be taken as a serious threat.

It is submitted, therefore, that upon analysis the two reasons advanced by these petitioners in support of the petition for the writ utterly fail to demonstrate the importance of this case.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

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